(2)

Supreme Court, U.S.
FILED
DEC 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-549

In The
Supreme Court of the United States
October Term, 1988

JAMES W. LEE,

Petitioner,

v.

EKLUTNA, INC., UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR, DIRECTOR, BUREAU OF LAND MANAGEMENT,

Respondents,

THERESE U. DONNELLY, Personal Representative of the Estate of Joseph F. Donnelly, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT EKLUTNA, INC.'S BRIEF IN OPPOSITION

DAVID P. WOLF
JAMES S. CRANE
Counsel for Respondent, Eklutna, Inc.
420 L Street, Suite 302
Anchorage, Alaska 99501
(907) 276-5152

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

33 pp

QUESTIONS PRESENTED

1. Whether § 14(c)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1613(c)(1), should be construed against a trespasser on Federal land to deny him amnesty and the right to take the land away from an Alaska Native Village Corporation, the intended beneficiary of ANCSA and holder of the patent to the land?

2. Whether the United States is an indispensable party to a suit filed by a failed homesteader under ANCSA § 14(c)(1) against an Alaskan Native Village Corporation?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS WHY THE PETITION SHOULD BE DENIED	9
I. ANCSA WAS INTENDED TO BENEFIT ALASKA NATIVES, NOT TO BENEFIT TRESPASSERS	10
II. THE ALASKA SUPREME COURT HAS NOT HELD THAT § 14(c)(1) OFFERS AMNESTY TO TRESPASSERS	12
III. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE UNITED STATES IS AN INDISPENSABLE PARTY TO LEE'S CLAIM TO A HOMESTEAD	15
IV. THE DECISION BELOW WAS JUSTLY DECIDED AND IS OF LIMITED IMPACT	22
CONCLUSION	23
APPENDIX	A-1

TABLE OF AUTHORITIES

Page

CASES

Block v. North Dakota, 461 U.S. 273 (1983) 18

Buch v. Morton, 449 F.2d 600 (9th Cir. 1971) 7

Buettner v. Kavilco, Inc., — F.2d —, 1988 West Law 111344 (October 26, 1988) (9th Cir. 1988) 13, 14

California Fed. Sav. and Loan Ass'n. v. Guerra, 479 U.S. 272, 107 S.Ct. 683 (1987) 12

Cape Fox Corp. v. United States, 4 Cl.Ct. 223 (1983) 10

Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) 12

Donnelly v. United States, 841 F.2d 968 (9th Cir. 1988) 8, 9, 15, 18

Duluth & Iron Range RR. v. Roy, 173 U.S. 587 (1899) 18

Hakala v. Atxam Corporation, 753 P.2d 1144 (Alaska 1988) 8, 13, 14

Hoofnagle v. Anderson, 20 U.S. (7 Wheat) 212, 5 L.Ed. 437 (1822) 18

Kale v. United States, 489 F.2d 449 (9th Cir. 1973), *cert. denied* 417 U.S. 915 (1974) 18

Lee v. Eklutna, Inc., — U.S. —, 108 S.Ct. 772 (1988) 5

Lee v. United States, 629 F.Supp. 721 (D.Alaska 1985), *aff'd* 809 F.2d 1406 (9th Cir. 1987), *cert. denied sub nom Lee v. Eklutna, Inc.*, — U.S. —, 108 S.Ct. 772 (1988) 15, 17

Lee v. United States, 629 F.Supp. 721 (D.Alaska 1985) 4, 5, 9, 17

Lee v. United States, 809 F.2d 1406 (9th Cir. 1987) 5, 18

Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371 (1945) 20

TABLE OF AUTHORITIES—Continued

Page

Nichols v. Rysavy, 610 F.Supp. 1245 (D.C.S.D. 1985), *aff'd* 809 F.2d 1317 (8th Cir. 1987), *cert. denied* 108 S.Ct. 147 (1987) 19

Nichols v. Rysavy, 809 F.2d 1317 (8th Cir.), *cert. denied* 108 S.Ct. 147 (1987) 20

Norfolk Redev. and Housing Auth. v. Chesapeake and Potomac Tel. Co. of Va., 464 U.S. 30 (1983) 12

United States v. Public Utilities Commission of California, 345 U.S. 295 (1953) 11

United States v. Western Pac. RR., 352 U.S. 59 (1956) 21

STATUTES, REGULATIONS AND RULES

16 U.S.C. 818 (Federal Power Act, § 24) 2, 7

28 U.S.C. 1491(a)(1) 5

28 U.S.C. 2409a (Quiet Title Act) 18

28 U.S.C. 2409a(g) 9, 15, 18

43 U.S.C. 141 (Pickett Act) (repealed) 7

Alaska Native Claims Settlement Act (ANCSA),

43 U.S.C. 1601 *et seq.* 1

43 U.S.C. 1601(a) (ANCSA § 2(a)) 6, 10

43 U.S.C. 1601(b) (ANCSA § 2(b)) 6

43 U.S.C. 1603(b) (ANCSA § 4(b)) 1

43 U.S.C. 1607(a) (ANCSA § 8(a)) 1

43 U.S.C. 1610(a) (ANCSA § 11(a)) 4

43 U.S.C. 1610(b) (ANCSA § 11(b)) 1

43 U.S.C. 1611(a)(1) (ANCSA § 12(a)(1)) 1

TABLE OF AUTHORITIES—Continued

	Page
43 U.S.C. 1613(a) (ANCSA § 14(a))	1
43 U.S.C. 1613(c)(1) (ANCSA § 14(c)(1)	*Passim*
43 U.S.C. 1613(g) (ANCSA § 14(g))	5, 14
43 U.S.C. 1621(b) (ANCSA § 22(b)	*Passim*
43 U.S.C. 1621(j)(2) (ANCSA § 22(j)(2))	20
43 U.S.C. 1632(b) (ANCSA § 33(b))	16
43 C.F.R. § 2650.3-1(a)	17
Fed. R. Civ. P. 19(a)	19
Fed. R. Civ. P. 19(b)	15, 19, 21
Pub. L. 94-579, Section 704(a), 90 Stat. 2792	7

OTHER AUTHORITIES

2A Sutherland Statutory Construction (4th Ed. 1984)	11
26 Fed.Reg. 2486 (1961)	3
117 Cong. Record 46781, 46785-86, 46788 (Dec. 14, 1971)	10

STATEMENT OF THE CASE

This case concerns the ownership of sixty-five acres of land in the Eagle River Valley near Anchorage, Alaska. Long before any white settlement, the Eagle River Valley was encumbered by aboriginal title and by traditional subsistence use and occupation of the valley by Alaska Natives.[1] These traditional claims of aboriginal title by the Natives were formally presented for adjudication before the Indian Claims Commission in 1953.[2] Donnelly App. E[3] at 84a. These claims were extinguished by § 4(b) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.* 43 U.S.C. 1603(b). Pursuant to ANCSA, Eklutna, Inc.[4] ("Eklutna") was formed as the Village Corporation which includes as shareholders the Natives of the area where the disputed land is found. 43 U.S.C. 1607(a), 1610(b). Eklutna selected and received patent to the surface estate to lands, including that currently in dispute, as settlement of their aboriginal claims. 43 U.S.C. 1611(a)(1), 1613(a).

---

[1]The term "Natives" in Alaska includes Indians, Aleuts, and Eskimos.

[2]Even earlier, all the lands in the Eagle River Valley which are relevant to this case had been part of the Eklutna Reserve established under the Indian Reorganization Act. Donnelly App. E at 84a.

[3]"Donnelly App." refers to the Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in *Donnelly v. United States*, no. 88-533. "Pet. App. E" refers to the Findings of Fact in the district court decision in that case, A75-27 Civil, United States District Court for the District of Alaska, February 5, 1981.

[4]Pursuant to Supreme Court Rule 28.1, Eklutna, Inc. has no parent company or subsidiary, except wholly-owned subsidiaries.

In 1957, James Lee ("Lee" or "petitioner") entered 160 acres, including the land now in dispute, to homestead it. CR[5] 87 (BLM files). The entry occurred thirty-two years after Power Site Classification ("PSC") 107 had withdrawn the disputed land from appropriation under the public land laws for power site purposes under Section 24 of the Federal Power Act, 16 U.S.C. 818, and seven years after PSC 399 had also withdrawn the land. Donnelly, App. E at 60a. Although in 1952 the Federal Power Commission ("FPC") determined that the value of the disputed land would not be injured or destroyed for the purposes of power development by location or entry, *id.* at 61a, the Secretary of Interior never acted pursuant to to Section 24 of the Federal Power Act to revoke the withdrawal, and the land therefore remained closed to entry.

At the time Lee filed his notice of location, he was notified in writing that "OCCUPANCY OR USE IS AT YOUR OWN RISK UNTIL FURTHER NOTICE FROM THE LAND OFFICE." CR 87. In 1958, Lee was advised in a letter from the FPC that, "We do not find that any restoration to entry of the subject lands has yet been made. Restoration is a function of the Bureau of Land Management . . . ." CR 76, Ex. 4. In February 1959, Lee and other settlers in the area sent a letter to the Secretary of the Interior asking for a clarification of their situation. CR 108, Ex. K. The Assistant Secretary responded in March of that year, stating that the settlement could not be recognized under existing law, that Lee was in trespass, and that even if the lands were re-opened to entry, Lee would

---

[5]"CR" refers to court record in the Lee case, no. A79-336, United States District Court for the District of Alaska.

not have preference rights. CR 108, Ex. L. These positions were repeated in a letter sent by the BLM in August 1959, which also denied Lee's entry. CR 80.

In 1961, BLM filed a platted survey of the area that delineated, *inter alia,* the boundaries of Classification 399 in relation to the potential homestead sites selected by petitioners. 26 Fed.Reg. 2486 (1961). Immediately afterwards, on April 27, 1961, BLM issued final decisions rejecting Lee's entry insofar as they conflicted with the power site withdrawal. Donnelly App. C at 36a.

Nevertheless, Lee filed a homestead entry final proof covering 160 acres in 1962. CR. 87. However, his final proof indicated a deficit in his cultivation requirements. *Id.*. Thereafter, Lee and his attorney met with the BLM to attempt a compromise. CR 87; CR 76, Ex. 20. Lee was allowed to "clarify" his final proof testimony at which time he increased the amount of acreage he claimed cultivated. He was required to build a habitable dwelling on the 95 acres located outside the withdrawn area and cultivate acreage in this area. CR 87. His prior residency on lands withdrawn from entry was considered "constructive" for purposes of gaining title to the 95 available acres. CR 76, Ex. 21, 22, 23.

Lee accepted the compromise. He submitted the proof of construction of a habitable dwelling and cultivation as required. CR 87. Although he was represented by legal counsel, Lee did not appeal the BLM's decision not to grant him the withdrawn 65 acres. CR 76, Ex. 21. In November, 1964, patent was issued to Lee for the 95 acres outside the power reserve. CR 76, Ex. 25. Lee thereafter had no application pending for additional acreage and took no fur-

ther action to pursue his original homestead claim. However, in 1967, Lee petitioned the BLM for restoration of the disputed land, which would have opened the land to homestead entry by interested persons. CR 87. Lee's petition was rejected in 1968, which decision was affirmed by the national office. Lee did not make further appeal to the Secretary. *Id.*

In 1970, Lee was served with a trespass notice, directing him to vacate the 65 acres inside the power reserve. In compliance with that notice, Lee moved off the land by November 1971. CR 105, 121 (Lee deposition pages 46-47, 181.)

Upon the adoption in December 1971 of ANCSA, the disputed land was again withdrawn to allow for selection and conveyance to Native corporations in settlement of their aboriginal claims. 43 U.S.C. 1610(a). Eklutna, Inc. ("Eklutna") selected the disputed land, the required notice was given by publication, and patent was issued to Eklutna in 1979. CR 87. Having compromised and settled his claims in 1963-64, *Lee v. United States,* 629 F.Supp. 721, 724-25 (D.Alaska 1985), and having no applications pending, Lee was no longer of record at this time.

Fifteen years after accepting the settlement and receiving patent to 95 acres, Lee filed a complaint in federal district court against the United States and Eklutna. CR 1. The case was consolidated with similar cases filed by two other claimants. CR 61. Lee sought patents from the United States to the portion of Eklutna's land for which he had sought to make homestead entries. He also sought conveyance from Eklutna on a variety of grounds: that Eklutna held the land subject to a constructive trust for the

benefit of Lee; that he was entitled to conveyance of the land as a homestead under ANCSA § 22(b), 43 U.S.C. 1621(b); that he was entitled to the land on the grounds that he had "prior existing rights" under ANCSA § 14(g), 43 U.S.C. 1613(g); that he was entitled to the land as its occupier under ANCSA § 14(c)(1), 43 U.S.C. 1613(c)(1), which requires a Native Village corporation to convey land to, *inter alia*, a person who occupies it as a principal place of residence.[6] See *Lee v. United States, supra* at 725.

In January, 1985, the district court granted judgment in favor of the United States and Eklutna on all claims except the claim under ANCSA § 14(c)(1). *Lee v. United States,* 629 F.Supp. 721 (D.Alaska 1985). The judgment of the district court was affirmed on appeal. 809 F.2d 1406 (9th Cir. 1987). This Court denied Lee's Petition for Certiorari under the name *Lee v. Eklutna, Inc.*, — U.S. —, 108 S.Ct. 772 (1988).

Lee's § 14(c)(1) claim was consolidated with that of another party, Joseph Donnelly, in *Donnelly v. United States,* No. A75-27 Civil, United States District Court for the District of Alaska. CR-D[7] 284. On November 26, 1986, the district court issued its Findings of Fact and Conclusions of Law granting summary judgment to Eklutna.

---

[6]Lee also filed monetary claims against the United States for an alleged taking of his property. The district court dismissed those claims, holding that because the amount in controversy exceeded $10,000, the Claims Court had exclusive jurisdiction under 28 U.S.C. 1491(a)(1). 629 F.Supp. at 733-34. Lee did not seek review of that ruling in the court of appeals.

[7]"CR-D" refers to the Donnelly Court Record, No. A75-27 Civil, United States District Court for the District of Alaska.

Donnelly App. C at 32a-49a. The court held that individuals cannot assert claims based on ANCSA § 14(c)(1) to the surface estate of lands conveyed to Alaska Native Village Corporations when these lands have been withdrawn from entry by the United States prior to the time that the individuals entered and remained upon them. *Id.* at 33a-34a, 42a. The court further held that the lands at issue were validly withdrawn as part of Power Site Classifications 107 and 399, and that they were never subsequently restored to public entry under the public land laws. *Id.* at 42a.

The district court rejected the contention that all that is required for an individual to obtain rights to village corporation lands under § 14(c)(1) is that the person physically "occupied [those lands] as of December 13, 1971 . . . as a primary place of residence, or as a primary place of business, or as a subsistence camp site, or as headquarters for reindeer husbandry," regardless of the status of those lands or the individual's right to use or reside upon them. 43 U.S.C. 1613(c)(1). The court stated that Lee's interpretation of § 14(c)(1) would operate to change the well established principle that individuals could not obtain rights under the public land laws to lands that had been withdrawn from entry by the federal government. Donnelly App. 43a (citations omitted). The court also felt it was "inconceivable" that Congress intended to reward trespassers at the expense of Alaska Natives when ANCSA was intended to provide "a fair and just settlement" of all native land claims to serve "the real economic and social needs of [Alaska's] natives." 43 U.S.C. 1601(a)-(b). The court stated that it would be "peculiar" for such a statute

to transform an individual's trespass into valid title. Donnelly App. C at 44a.

In an attempt to avoid trespasser status, Lee and Donnelly argued that they had equitably vested title to the disputed lands because those lands were not validly withdrawn when they initiated their claims. Lee and Donnelly contended that Power Site Classifications 107 and 399 did not constitute orders withdrawing lands from entry because they did not contain the word "withdraw" and that the Secretary of the Interior could not exercise the President's authority to withdraw lands for power purposes under the Pickett Act, 43 U.S.C. 141 (repealed October 21, 1976 by Pub. L. 94-579, Section 704(a), 90 Stat. 2792). The court rejected those arguments. Donnelly App. C 45a-46a. The court also rejected the claimants' contention that, even if the 1925 and 1950 orders validly withdrew the lands, § 24 of the Federal Power Act, 16 U.S.C. 818, required that the lands automatically became open to public entry when the Federal Power Commission issued its "no-injury" determination in 1952. The court held that § 24 is not "self-executing" and that it explicitly "contemplates action by the Secretary to terminate the [withdrawal] classification." Donnelly App. C at 47a, citing *Buch v. Morton*, 449 F.2d 600 at 607 (9th Cir. 1971). Because the Secretary did not issue an express order restoring the lands to entry, the lands remained withdrawn. Donnelly App. C at 48a. Moreover, the court further noted that, even if the Secretary had issued such an order, the State of Alaska would have been entitled to the first-preference rights, and qualified veterans would have had a superior right to other claimants, such as Lee and Donnelly. Donnelly App. C at 48a.

Following certifications under Civil Rule 54(b), Lee and Donnelly appealed[8]. The Ninth Circuit ruled against Lee and Donnelly in a decision filed on March 10, 1988 and amended on June 27, 1988. *Donnelly v. United States*, 841 F.2d 968 (9th Cir. 1988).[9] The court affirmed the district court's holding that ANCSA § 14(c)(1) could not operate as an amnesty provision extending rights to individuals who are merely trespassers, failed homesteaders, or land users without any vested rights prior to December 18, 1971 because there was no indication of congressional intent to override the established principal that individuals could obtain no rights to withdrawn lands. 841 F.2d at 975. In so ruling, the court approved the district court's position that congressional intent to provide a "just and fair settlement" of native land claims is inconsistent with an interpretation of § 14(c)(1) that would reduce the land patented to native corporations in favor of trespassers. *Id.*

The court also ruled against Lee on his claim that he was not a trespasser for the purposes of § 14(c)(1) by virtue of title having equitably vested before ANCSA withdrew all lands in 1971. Not deciding this issue on the merits of such title, the court ruled that such title was based on a homestead claim. Adopting the reasoning

---

[8]Only Eklutna's claims for ejectment are still pending.

[9]The reported decision is not the Amended Opinion, which is set forth at Donnelly App. A. The decisions differ in that the Amended Opinion contains a reference to a case decided by the Alaska Supreme Court during the period between the two court of appeals' decisions, *Hakala v. Atxam Corp.*, 753 P.2d 1144 (Alaska 1988). Donnelly App. A at 16a, n.9. *See infra* at pp. 13 to 14.

from the *Lee* district court decision, 629 F.Supp. 730-32, that ANCSA could not require Native corporations to resolve the merits of a homesteader's title dispute with the government, the court of appeals held that the United States was an indispensable party to a determination of a § 14(c)(1) claim based on a disputed homestead claim. In order to challenge the validity of the patents to Eklutna, Lee had to establish his own entitlement to the disputed lands, which he could do only in direct proceedings against the United States. The United States could not be made a party because the statute of limitations had run under the Quiet Title Act, 28 U.S.C. 2409a(g). *Donnelly, supra* at 974-975. Therefore, Lee's and Donnelly's claims were dismissed.

Lee then filed this petition for certiorari. Donnelly has also filed a petition for certiorari on the § 14(c)(1) issue and others, entitled *Donnelly v. United States,* no. 88-549.

———o———

REASONS WHY THE PETITION SHOULD BE DENIED

In affirming the district court's grant of summary judgment against Lee, the court of appeals correctly held that the language and intent of ANCSA § 14(c)(1) do not require that trespassers be awarded land at the expense of Native Corporations, the intended beneficiaries of ANCSA, and that the United States is an indispensable party to an ANCSA § 14(c)(1) claim based on a homesteading claim. The court of appeals' decision does not conflict with any decision of this Court, any decision

of another court of appeals, or with any decision of a state court of last resort. The decision does not present a question of general importance that should be reviewed by this Court.

I. ANCSA WAS INTENDED TO BENEFIT ALASKA NATIVES, NOT TO BENEFIT TRESPASSERS.

ANCSA was enacted in 1971 as a comprehensive settlement of the claims of Alaska Natives based upon aboriginal title. 43 U.S.C. 1601(a); 117 Cong. Record 46781, 46785-86, 46788 (Dec. 14, 1971). Its overall purpose is to provide "a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims . . ." 43 U.S.C. 1601(a). Congress further intended that ANCSA be liberally interpreted in favor of the Natives. *Cape Fox Corp. v. United States,* 4 Cl.Ct. 223, 231 n. 11 (1983).

Notwithstanding the fact that it is absurd to contend that a comprehensive status enacted to settle Native claims and to be liberally construed in favor of the Natives somehow grants rights to a trespasser like Lee, he argues that §14(c)(1) states in plain terms that an individual who occupied land in Alaska on December 18, 1971 is entitled to receive a deed.[10] Lee seeks to isolate a single clause in

---

[10]Lee's claim of occupancy is dubious because he did not actually occupy the disputed land on December 18, 1971. In his Petition for Certiorari at p. 6, Lee claims that he has lived on the "unitary" 160 acre tract since 1958, except for a period of military service. Without citation to the record below, he further claims that after being served with a Notice of Trespass by the BLM in 1971, he removed "some of his improvements"

(Continued on following page)

a much larger statute, which is in turn but one part of the entire body of the public land laws. The proper approach for interpreting § 14(c)(1) is to construe that provision in light of ANCSA as whole, giving equal weigh to all provisions in the enactment and construing the overall act so as to harmonize its various provisions. 2A SUTHERLAND STAT. CONST. §§ 46.05, 47.02 (4th Ed. 1984).

Section 14(c)(1) cannot be read in literal terms where the literal meaning would produce absurd results. *United States v. Public Utilities Commission of California,* 345 U.S. 295, 315 (1953). If Lee is correct in asserting that § 14(c)(1) applies in this situation, then every rejected homestead entryman, every unsuccessful applicant for a trade and manufacturing site or headquarters site, and every person who has failed to lawfully acquire a small tract entry, will have vested rights under § 14(c)(1). Lee's interpretation would sweep aside all applicable land laws concerning homesteads, trade and manufacturing sites, headquarters sites, and small tracts. Yet there is nothing in § 14(c)(1) or any other part of ANCA which repeals these laws. On the contrary, ANCSA § 22(b) concerning homesteads makes it clear that these laws are to be fully enforced.

Even worse, under Lee's interpretation, willful trespass and knowing violation of the public land laws would

---

(Continued from previous page)

from the disputed land. However, in his deposition, Lee admitted that he removed his physical improvements from the disputed land. This Opposition, *supra* at 4. Apparently, Lee is trying to treat residence on the 95 acres he accepted as a compromise to his homestead claim as residence on the remaining 65 acres. Lee cannot show he occupied as a primary place of residence any more than the land he received as a homestead.

be rewarded under § 14(c)(1). Since § 14(c)(1) clearly requires occupancy, a rejected entryman who obeyed the public land laws, relinquished his or her unlawful entry, and moved off the land prior to ANCSA could gain no rights under § 14(c)(1). Those who stayed in spite of the rejection of their unlawful entries, trespass notice, and full knowledge that they had no right to entry or occupancy, would be entitled to benefits under § 14(c)(1).

Although the language of § 14(c)(1) contains only a reference to occupancy, it is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *California Fed. Sav. and Loan Ass'n. v. Guerra*, 479 U.S. 272, 107 S.Ct. 683, 691 (1987), quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). As in all cases of statutory construction, this Court's task is to interpret the words of the statute in light of the purposes Congress sought to serve. *Norfolk Redev. and Housing Auth. v. Chesapeake and Potomac Tel. Co. of Va.*, 464 U.S. 30, 36 (1983). ANCSA was never designed to be remedial legislation for homesteaders whose entries had been rejected. Since ANCSA was enacted for the purpose of remedying prior wrongs and neglect suffered by the Native peoples of Alaska, it must be construed in light of this purpose. Lee's interpretation is not just inconsistent with the spirit of ANCSA, it would actually defeat the basic intent of the Act.

II. THE ALASKA SUPREME COURT HAS NOT HELD THAT § 14(c)(1) OFFERS AMNESTY TO TRESPASSERS.

Lee maintains that the "gist" of his petition is whether the courts should "transpose" the limitations of the home-

stead laws to § 14(c)(1) reconveyances. Petition at 15. He argues that in *Hakala v. Atxam Corporation,* 753 P.2d 1144 (Alaska 1988), the Supreme Court of Alaska adopted a reading of § 14(c)(1) that held that there were "no conditions under that statute to preexisting titles or withdrawals." Petition at 21. Lee implies that the decision in *Hakala* is in conflict with the court of appeals' decision in this case. Petition at 16. Lee's characterization of the *Hakala* case is erroneous, because the Alaska Supreme Court found that a condition to a § 14(c)(1) reconveyance was legal occupancy. That finding was echoed in *Buettner v. Kavilco, Inc.*, — F.2d —, 1988 West Law 111344 (October 26, 1988) (9th Cir. 1988).

In *Hakala,* the Alaska Supreme Court held that a hunting guide was entitled to a § 14(c)(1) reconveyance of a hunting cabin and curtilage used as a primary place of business. The Alaska Supreme Court saw "the primary issue" as being "how the court should interpret the phrase 'a primary place of business' as contained in § 14(c)(1) of ANCSA." 753 P.2d at 1147. The court perceived the phrase "a primary place of business" as effectuating Congress' intent to protect a "wide array of existing legitimate businesses," those who were using the lands in "an *established, legal* and *routine* fashion." *Id.* (Emphasis added.) The court in *Hakala* was apparently not confronted with a trespasser or a claimant who was on the land illegally. Although the decision by the court of appeals in this case was apparently not brought to the attention of the Alaska court, the Alaska court clearly recognized that a claimant under § 14(c)(1) must be legally on the land in order to state a claim, a status which Lee did not have.

In an extremely recent decision, the Ninth Circuit has noted that *Hakala* is consistent with an interpretation of § 14(c)(1) that denies a right of reconveyance to illegal occupants but grants a right to legal occupants. *Buettner v. Kavilco, Inc., supra.* In that case, the plaintiff, who held a special use permit from the United States Forest Service to build a year-round residence on land selected by the defendant Native corporation, sought reconveyance of the land pursuant to § 14(c)(1). The court of appeals held that the plaintiff's status as a "prior existing right" under ANCSA § 14(g) (43 U.S.C. 1613(g)) did not preclude a claim under § 14(c)(1). 1988 West Law 111344 at p. 2. Noting that the decision of the court of appeals in this case denied rights under § 14(c)(1) to trespassers, the court found that the plaintiff was legally on the land by virtue of the Forest Service permit and that the *Hakala* decision also recognized the rights of legal occupants. 1988 West Law 111344 at pp. 2-3.

Thus, the courts that have considered the matter have consistently stated that § 14(c)(1) grants rights only to legal occupants, not illegal ones. Both the federal and Alaska state courts are in agreement on that point. For that reason, Lee misses the point when he characterizes the gist of this case as being the transposition of homestead law onto ANCSA. The gist of this case is his own invalid occupancy, which Congress clearly did not intend to be a basis for a claim under § 14(c)(1).

III. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE UNITED STATES IS AN INDISPENSABLE PARTY TO LEE'S CLAIM TO A HOMESTEAD.

As discussed above at pp. 7-9, Lee attempted to show legal occupancy by claiming that he had equitable vested title to the disputed land. The court of appeals correctly dismissed this claim without reaching the merits. The court reasoned that such a claim was essentially a homestead claim against the United States; the statute of limitations on the homestead claim had run under the Quiet Title Act, 28 U.S.C. 2409a(g), so that the United States could not be made a party; dismissal was required under Fed. R. Civ. P. 19(b) because the United States was an indispensable party. 841 F.2d at 975. In his Petition, Lee never directly asks for reversal of this ruling, perhaps in recognition that he had previously substantially litigated the indispensable party issue and lost. *Lee v. United States,* 629 F.Supp. 721 (D.Alaska 1985), *aff'd* 809 F.2d 1406 (9th Cir. 1987), *cert. denied sub nom Lee V. Eklutna, Inc.,* — U.S. —, 108 S.Ct. 772 (1988). See pp. 5-6, *supra.*

The court of appeals correctly determined that Lee's claim under § 14(c)(1) based on equitably vested title was essentially a homestead claim. Although Lee never argues that his occupancy arose from anything other than an attempt at homesteading, the argument is indirectly made that the § 14(c)(1) claim is independent from the homestead claim. *See,* Petition at 21 ("By enacting § 14(c)(1) Congress intended a new, independent grant to arise as of the date of conveyance . . . . "). Under this theory, § 14(c)(1) would also have to protect lawful homestead entries, since Congress could never be deemed to have pro-

tected unlawful entries while sacrificing lawful ones. But Congress obviously did not agree with Lee's interpretation of § 14(c)(1). In order to protect valid homestead entries, it was deemed necessary to add ANCSA § 22(b), which deals with homestead claimants, and even more specifically with homestead claimants who had not performed all requirements of law for a patent, as evidenced by receiving certificate of final proof. As to claimants who had obtained a certificate of final proof, § 22(b) provides that they should receive patent as soon as possible. As to claimants who had not obtained a certificate of final proof, they would be permitted to perfect their claims and ultimately obtain patent. Section 22(b) would not have been necessary if Congress had originally intended that § 14(c)(1) was to apply to homestead entries.

Thus, § 14(c)(1) does not address persons such as Lee who have made formal entry under the homestead laws. Formal entries upon the public lands pursuant to the homestead laws are governed exclusively by § 22(b), and rights are accorded only to lawful entries in full compliance with the applicable statutes. The court of appeals therefore correctly concluded that Lee's § 14(c)(1) claim is essentially a homestead claim and should be treated as such.

As a further argument that his equitable title claim under § 14(c)(1) should not be treated the same as his homestead claim under § 22(b), Lee also contends that the fact that ANCSA § 33(b) (43 U.S.C. 1632(b)) provides a separate statute of limitations for judicial review of a Native Corporation's § 14(c)(1) decisions is evidence that Congress "believed that § 14(c) had nothing to do either with the Quiet Title Act or the Secretary's land title decisions under ANCSA." Petition at 24-25. In a sense,

Lee is perfectly correct: Congress did not intend that homestead claims under 22(b) could be renewed or relitigated through the "backdoor" of § 14(c)(1). A separate statute of limitations for § 14(c)(1) claims is necessary because of the fact that § 14(c)(1) rights are asserted only after patent of land by the federal government to a Native Corporation, and after the Native Corporation makes the initial determination of a claimant's rights. In contrast, § 22(b) operates *prior to,* rather than following, any ANCSA conveyance: it requires the Secretary of Interior to assess the validity of potential claims that might be raised under the homestead laws before conveying lands involving such claims to native corporations. The Secretary's regulations provide that he will not convey to a Native corporation any land for which he determines that valid homestead entries have been made. 43 C.F.R. §2650.3-1(a). *See, Lee v. United States,* 629 F.Supp. 721, 729-731 (D.Alaska 1985). Therefore, the fact that Congress enacted a statute of limitations for review of a Native Corporation's § 14(c)(1) decisions does not mean that Congress intended to extend or revive homestead claims or to confer new substantive rights on homesteaders.

Having correctly perceived that Lee's § 14(c)(1) claim based on "equitable title" is essentially a homestead claim, the court of appeals correctly applied the reasoning from Lee's previous case in dismissing the § 14(c)(1) claim for the failure to join the United States as an indispensable party. *Lee v. United States,* 629 F.Supp. 721 (D.Alaska 1985), *aff'd* 809 F.2d 1406 (9th Cir. 1987), *cert. denied sub nom Lee v. Eklutna, Inc.,* — U.S. —, 108 S.Ct.

772 (1988). Claims against the United States for patents to the disputed land are governed by the Quiet Title Act, 28 U.S.C. 2409a. *Id.; Block v. North Dakota,* 461 U.S. 273 (1983). Lee knew or should have known of the United States' claim to the disputed land in 1961 at the very latest when the BLM issued the final decisions denying his homestead claims. *Lee,* 809 F.2d at 1410; *Donnelly, supra* at 974. Because Lee did not file suit until at least fifteen years later, the claim against the United States is barred by the twelve year statute of limitations in 28 U.S.C. 2409a(g). *Id.* Congress intended for section 2409a (g) to apply retroactively. *Block, supra* at 286, n.3.

The court of appeals correctly decided that Lee's equitable title claim had to be dismissed in the absence of the United States as a party. That claim "can only properly establish [his] entitlement to the lands in direct proceedings against the United States." *Lee v. United States,* 809 F.2d at 1411. In order to establish his entitlement to the lands, Lee must show his own entitlement as against the United States. *Id.* at 1410; *Kale v. United States,* 489 F.2d 449, 454 (9th Cir. 1973), *cert. denied* 417 U.S. 915 (1974):

> Kale has no basis for an attack upon the land patent granted to Cord. A United States patent is protected from easy third-party attack. *Hoofnagle v. Anderson,* 20 U.S. (7 Wheat) 212, 5 L.Ed. 437 (1822). It is not sufficient for one challenging a patent to show that the patentee should not have received the patent; he must also show that he (the challenger) is entitled to it. *Duluth & Iron Range RR. v. Roy,* 173 U.S. 587, 590 (1899). (Citation omitted.)

The result of this suit on the merits will depend entirely upon whether Donnelly was entitled to patent from

the United States government. Eklutna is an innocent party, having selected available lands, according to the public records, in settlement of its aboriginal claims. The "United States is the party who issued the fee patent in question, thus setting the entire series of events in motion that resulted in the action." *Nichols v. Rysavy,* 610 F. Supp. 1245, 1253 (D.C.S.D. 1985), *aff'd* 809 F.2d 1317 (8th Cir. 1987), *cert. denied* 108 S.Ct. 147 (1987) (United States held to be an indispensable party to suit challenging the validity of fee patents issued to Native Americans).

Federal Rule of Civil Procedure 19(a) sets forth the conditions for determining if a person ought to be joined as a party,[11] and Rule 19(b) describes the conditions under which a suit should be dismissed if joinder is not possible.

The United States is a party that should be joined under Rule 19(a) because it has an "interest" that would be impaired if Lee were to prevail on the merits against Eklutna: if Eklutna loses this action and has to convey the disputed land to Lee, the United States will have to make up the acreage to Eklutna. As discussed above at pp. 15-17, the court of appeals correctly characterized Lee's § 14(c)(1) claim as a homestead claim. Congress intended

---

[11]Rule 19(a) states:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest . . . .

that the Village Corporation's land entitlements not be reduced by homestead claims, which Congress saw as being decided under § 22(b) prior to conveyance to Village Corporations. *Supra* at 16-19. Consistent with this intent, 43 U.S.C. 1621(j)(2) (ANCSA § 22(j)(2)) requires the Secretary of the Interior to make additional acreage available to the Village Corporations for selection and conveyance, if the original selections were inadequate. If Eklutna's land is reduced because it is required to reconvey the disputed land to Lee to satisfy a § 14(c)(1) claim which is essentially a homestead claim, the United States will be required to make up that acreage to Eklutna.

Thus, whether the United States will be deprived of additional land depends precisely on whether Lee prevails in his suit against Eklutna. But "the government's liability cannot be tried behind its back." *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 375 (1945), cited in *Nichols v. Rysavy*, 809 F.2d 1317, 1333 (8th Cir.), *cert. denied*, 108 S.Ct. 147 (1987) (United States was indispensable party to suit attacking fee patents to Native Americans.)[12]

---

[12]The United States may also have an interest because resolution of this case would turn on a variety of factual and legal issues that directly implicate the interests of the United States—e.g., whether the Secretary of the Interior erred when he determined that the land within the withdrawal area was not available for homestead entry, whether Lee otherwise complied with the homestead laws, whether other persons would have had superior claims to the lands, and whether Lee abandoned or compromised his claims in the 1960's. In the normal course, all of these questions would be decided by the Secretary in the

(Continued on following page)

An analysis using the four-part test provided in Rule 19(b) that must be applied in each case to determine whether, in equity and good conscience, the action should proceed in the absence of the United States shows that the court of appeals correctly determined that the action should not proceed. The first part is whether a judgment will prejudice the absent party. Here, the prejudice to the United States is clear. As explained above, the United States will have to make up any land reconveyed under § 14(c)(1) by Eklutna to Lee for his homestead claim.

The second part of the test is whether relief may be shaped to lessen the harm to the absent party. In this case, there appears no way to tailor a judgment in favor of Lee that would lessen the prejudice to the United States. Moreover, a result that would require Eklutna to bear the loss of land conveyed to Lee is unfair, since even Lee does not contend that Eklutna was at fault; any alleged legal error in the circumstances of this case instead is attributable to the federal government in its administration of the public land laws.

The third and fourth parts of the test mentioned in Rule 19(b) are whether a judgment rendered in the United States' absence would be adequate and whether the plaintiff would have an adequate remedy if the action is dismissed for non-joinder. Although these factors are some-

---

(Continued from previous page)

first instance under the doctrine of primary jurisdiction (see, e.g., *United States v. Western Pac. RR.*, 352 U.S. 59, 63-64 (1956), and the Secretary would be a party to any suit seeking judicial review. This interest was asserted by the government in the Brief for the Federal Respondents in Opposition to Lee's previous petition for certiorari. No. 87-642.

what in favor of not requiring dismissal of Lee's claim to equitable title, it should be noted that the latter part of the test is not particularly compelling: at one time, Lee did have an adequate remedy in the nature of a suit against the United States, but he voluntarily allowed the statute of limitations to run.

Thus, "equity and good conscience" hardly compel allowing Lee's claims against Eklutna to proceed in the absence of the United States. Lee's problems are of his own making, and they are not of Eklutna's making. By no later than 1961, he knew of the government's position that the land was not available for homesteading, but he failed to bring suit for more than eighteen years. If Lee had sued in a timely manner, the government would have been a defendant. If Lee had prevailed, the disputed lands could have been excluded from the grants to Eklutna.

In light of Lee's lack of diligence and in light of the basic unfairness to Eklutna arising from having to resolve the merits of Lee's homestead claim against the government, the court of appeals' conclusion that the United States is an indispensable party squarely comports with "equity and good conscience."

IV. THE DECISION BELOW WAS JUSTLY DECIDED AND IS OF LIMITED IMPACT.

Although of great importance to Eklutna, this case will have no practical impact outside the state of Alaska. Even within the state, its impact will be limited to failed homesteaders of lands conveyed to Native Corporations. Eklutna does not know how many such failed homesteaders there are, but there are almost certainly not the "thou-

sands" Petitioner alleges (Petition at 27) without the slightest shred of evidence in the record.

This case involves nothing more than the argument of a failed homesteader that ANCSA, which was enacted for the benefit of Alaska's Natives, provides him with amnesty from his failure to comply with the provisions of federal law concerning homesteads and, thereby, entitles him to sixty-five acres in addition to the ninety-five he has already received. The district court's and the court of appeal's interpretation of § 14(c)(1) that distinguishes between legal and illegal occupants, whether Native or non-Native, is just and fair.

———o———

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID P. WOLF
JAMES S. CRANE

Counsel for Respondent, Eklutna, Inc.

COPELAND, LANDYE, BENNETT AND WOLF
420 L Street, Suite 302
Anchorage, Alaska 99501
(907) 276-5152

APPENDIX[13]

28 U.S.C. 1491(a)(1)

The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

43 U.S.C. 141 (repealed)

The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

---

[13]Petitioner did not submit an appendix, apparently relying on the appendix submitted in the related case, *Donnelly v. Eklutna, Inc., et al.*, no. 88-533 (pending). Eklutna will similarly utilize the Donnelly Appendix, as supplemented by this appendix.

43 U.S.C. 1603. Declaration of Settlement

(b) Aboriginal title and claim extinguishment where based on use and occupancy; submerged lands underneath inland and offshore water areas and hunting or fishing rights included

All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

43 U.S.C. 1607. Village Corporations

(a) Organization of Corporation prerequisite to receipt of patent to lands or benefits under chapter

The Native residents of each Native village entitled to receive lands and benefits under this chapter shall organize as a business for profit or nonprofit corporation under the laws of the State before the native village may receive patent to lands or benefits under this chapter, except as otherwise provided.

43 U.S.C. 1610. Withdrawal of public lands

(b) List of Native villages subject to chapter; review; eligibility for benefits; expiration of withdrawals for villages; alternative eligibility; eligibility of unlisted villages

(1) The Native villages subject to this chapter are as follows:

NAME OF PLACE AND REGION

* * * *

Eklutna, Cook Inlet

43 U.S.C. 1611. Native Land Selection

(a) Acreage limitation; proximity of selections and size of sections and units; waiver

(1) During a period of three years from December 18, 1971, the Village Corporation for each Native village identified pursuant to section 1610 of this title shall select, in accordance with rules established by the Secretary, all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled under section 1613 of this title. The selection shall be made from lands withdrawn by section 1610(a) of this title: *Provided,* that no Village Corporation may select more than 69,120 acres from lands withdrawn by section 1610 (a)(2) of this title, and not more than 69,120 acres from the National Wildlife Refuge System, and not more than 69,120 acres in a National Forest: *Provided further,* That when a Village Corporation selects the surface estate to lands within the National Wildlife Refuge System or Naval Petroleum Reserve Numbered 4, the Regional Corporation for that region may select the subsurface estate in an equal acreage from other lands withdrawn by section 1610(a) of this title within the region, if possible.

Fed. R. Civ. P. 19(b) *Determination by Court Whenever Joinder Not Feasible*

If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dis-

missed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.